No. 12081

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK EDWARD ALEXANDER, WESLEY BISSEY, PHILLIP BOCK, BEN DOBBS, DOROTHY BASKIN FOREST, SAMUEL HARRY KASINOWITZ, MARGARET IRIS NOBLE, MIRIAM BROOKS SHERMAN, DELPHINE MURPHY SMITH, and HENRY STEINBERG,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE.

JAMES M. CARTER,
United States Attorney,

MAX H. GOLDSCHEIN,
Special Assistant to the Attorney General,

FRANK DE NUNZIO,
VINCENT RUSSO,
Special Assistants to the Attorney General,

600 United States Postoffice and
Courthouse Building, Los Angeles 12,
Attorneys for The United States of America,
Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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BRIEF FOR THE APPELLEE.

Jurisdictional Statement.

This is a consolidated appeal from a judgment and order of the United States District Court, for the Southern District of California, Central Division, entered on October 25, 1948, adjudging the ten appellants guilty of civil contempt and ordering them committed to the custody of the Marshal until each answers the specified questions before the Grand Jury, or until further order of the Court (copy of judgment, order and commitment, Appendix 1).

The District Court had jurisdiction of the proceeding under Section 401, United States Code, Title 18 (new).

This Court has jurisdiction of this appeal under Title 28, United States Code, Section 1291 (new) and under Section 1294 (1) (new).

The Questions Involved.

(1) Whether the answer "yes" to the first three questions propounded to the ten appellant witnesses would tend to incriminate them for an offense against the United States Government.

(2) Whether the answer to the additional questions 4 and 5 propounded to three of the appellant witnesses would tend to incriminate them for an offense against the United States Government.

Statutes Involved.

The proceedings were based upon Title 18, Section 401, U. S. C. (new):

> "Power of Court.
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order rule, decree, or command."

Statement of the Case.

Appellants were subpoenaed as witnesses before the United States Grand Jury, sitting at Los Angeles on October 25, 1948. They were individually advised that the investigation was not directed toward them, but that they were subpoenaed as witnesses [R. 59, 119, 146, 155, 161, 167, 180, 184, 188]. They were individually asked certain

questions, which they refused to answer on the ground that the answers might tend to incriminate them. On the same day, they were brought before District Judge, Honorable Peirson M. Hall, who heard the oral complaint of the Grand Jury and the questions which had been propounded to each of the witnesses [R. 46]. After a hearing, in open Court, on the question of self-incrimination, each of the witnesses, in accordance with the suggestion of counsel for the Government, requested to be heard by the Court, privately, in chambers, and in the absence of all counsel, to further show to the Court that the answers tended to incriminate them. After so hearing each of said witnesses, the Court found that the statements of the witnesses in chambers, added nothing to the evidence already adduced in open Court, and ordered each, to then and there, return before the Grand Jury, which was then in session, and answer the specified questions. On the same day, the witnesses returned before the Grand Jury and the questions ordered by the Court to be answered, were asked of each. The witnesses again refused to answer the questions on the grounds that the answers would be incriminating. The Grand Jury then returned to the Court Room and advised the Court that all of the said witnesses persisted in their refusal to answer the questions, in violation of the Order of the Court.

The Court, in open hearing, again heard evidence of the witnesses' refusal to answer the questions, at the conclusion of which, the Court held the appellants guilty of civil contempt.

ARGUMENT.

I.

The Witnesses' Claim of Privilege Is Spurious.

The appellants each were asked some, and others all, of the following questions, which they refused to answer and for which they were committed in contempt:

1. Do you know the names of the county officers of the Los Angeles County Communist Party?
2. Do you know the table of organization of the Los Angeles County Communist Party?
3. Do you know Ned Sparks?
4. By whom are you employed?
5. For whom are you an organizer?

(Question number 5 was asked after the witnesses testified that their occupation was that of "an organizer.")

(The numbers opposite the name indicates the above numbered question that the witness refused to answer).

Frank Edward Alexander—1, 2 [R. 227].

Dorothy Baskin Forest—1, 2 [R. 223, 224].

Henry Steinberg—1, 2 [R. 207, 208].

Samuel Harry Kasinowitz—1, 2 [R. 225, 226].

Delphine Murphy Smith—1, 2, 3 [R. 217, 218, 219].

Wesley Bissey—1, 2, 3 [R. 213].

Margaret Iris Noble—1, 2, 3 [R. 210, 211].

Ben Dobbs—1, 2, 3, 5 [R. 215, 216].

Phillip Bock—1, 2, 5 [R. 222].

Miriam Brooks Sherman—1, 3, 4 [R. 220, 221].

The appellant witnesses, from the time they were served with subpoenas, until the final action of the Court in committing them for contempt, followed a concerted and determined course of action to obstruct and defeat the purpose of the Grand Jury to investigate a matter which the witnesses decided should not be inquired into, although it did not involve them. Their first action was to file a motion to quash the subpoena, alleging:

(1) That there was discrimination in the selection of the Grand Jurors;

(2) That the Grand Jury was not conducting a bona fide investigation within the scope of its powers, but its motives were political in nature;

(3) That the purpose of the investigation was to harass and annoy persons believed to be members of the Communist Party and to discriminately apply the law [R. 10].

These attacks were made before the witnesses had appeared before the Grand Jury and before they could have known of the matters under investigation and before the word "communist" had been used in any way by counsel for the Government, or the Grand Jury. When they appeared before the Grand Jury, the witnesses were advised that they were not under investigation. They were then questioned and each claimed his privilege against self-incrimination. Thereafter, it was insisted on their behalf before the Court that "* * * these people are placed in jeopardy by reason of the existence or the alleged existence of this Grand Jury, and its alleged attempt to function" [R. 52] and that "* * * it is entirely a political manoeuvre on the part of the Democratic Administration, instituted particularly at this time, with relation to the election

for the purpose of attempting to influence the election, not for the purpose of obtaining any information concerning any alleged crime. [R. 52, 53.]

In support of this claim of privilege against self-incrimination, the appellant witnesses offered to prove:

(1) That the Grand Jury in the Southern District of New York had returned indictments charging members of the Communist Party of the United States of America with violation of Title 18, Section 2385 (Title 18, Sec. 10, old), U. S. C., known as The Smith Act, making it a crime against the United States to organize, or help to organize, any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force and violence, or to be, or become, a member of such organization, knowing its purpose [R. 76-77];

(2) That the Attorney General has declared the Communist Party to be a subversive organization [R. 82];

(3) That the Attorney General is alleged to have made statement indicating his intent to bring similar indictments throughout the United States, including Los Angeles [R. 80].

The appellants have laid no foundation for the introduction of evidence in support of these contentions. (1) There was no showing that the evidence so offered was material or applicable. (2) There was no showing that there was any connection between the appellants (witnesses) and the Los Angeles County Communist Party or the ten members of the Communist Party of the United States of America, who were indicted in New York. (3) There was no showing that there was any connection be-

tween the Los Angeles County Communist Party and the Communist Party of the United States of America. The order of the Attorney General,[1] declaring that the Communist Party was a subversive organization, is a standard of qualification to determine the loyalty of Federal employees only, and is not an order declaring the Communist Party of Los Angeles, or of any other city, an illegal body.

These ten appellant witnesses made no claim that they are communists. They, however, want the Court to believe that any statement that they may make with reference to knowing the names of the officials of the Los Angeles County Communist Party, its table of organization, or knowing Ned Sparks, and of some, their employment, may leave an inference that they are communists; and consequently they want the Court to reason this would tend to involve them in the commission of a Federal crime. This, of course is untenable, especially since it is not a violation of the law to believe in communism or be a member of the Communist Party. Their sole object is to obstruct and stop this investigation. In this, to date, they have been successful.

[2]Let us say, for the sake of argument, that the Grand Jury was making inquiry with reference to a false statement made by a Federal employee to a governmental agency with reference to his membership in an organization designated by the Attorney General as being subversive in connection with the loyalty program in violation of Title 18, Section 1001. Would it not be the duty

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[1]Fed. Reg., Vol. 13, No. 56, page 1471.

[2]This is in answer to a question asked at the hearing *in banc*.

of the Grand Jury to attempt to learn the name of the officer of said organization who had custody of its books and records, have subpoena *duces tecum* served on him to have him bring those books and records to the Grand Jury, that it may learn whether said Federal employee is a member of this organization and so determine whether or not his statement was false? Can these witnesses, who have no connection with the matter, be permitted to thwart this investigation by the Grand Jury? Of course not.

Let us here examine the claim of danger to which the witnesses would be exposed, should they answer the first three questions hereinabove set forth in the affirmative in order to determine whether or not the answers thereto would be a "rung of the rational ladder by which appellants may be reached."

If we were to assume that appellants' answers would be "yes," that is, that they know the names of the officials of the Los Angeles County Communist Party, their table of organization and Ned Sparks. How could these answers tend to incriminate the witnesses? It is argued in their behalf that if they answered these questions it may show an association which may be a link in a chain of evidence of a crime under the Smith Act. Would knowing the names of Nazi Party officials and their table of organization show one to be an associate of Nazis? Of course not. Association with the members of one's family, fellow employees, with members of one's social or religious groups could not possibly be a link in any kind of a chain of evidence that is in violation of any law. The

mythical association which the witnesses want the Court to infer into existence, must be of such a nature and character and under such circumstances and conditions as to show an intent on the part of the witness to violate the Smith Act.

The witnesses were not limited to making their showing of a present danger to them in open Court where counsel for the Government would hear their statements and might obtain a lead for further inquiry. The witnesses were given an opportunity to make their showing to the Court privately in Chambers, and although they availed themselves of the opportunity of talking to the Court in Chambers, they told him nothing that added to the statements made by their counsel in open Court, which was no more than, that the answers to the questions would tend to incriminate them.[3]

The witness, Miriam Brooks Sherman, was asked her occupation and answered that she was a musician. However, when she was asked who she was employed by, she claimed her privilege against self-incrimination. Can it be believed that telling who a musician is employed by would be an evidenciary lead to a violation of the Smith Act?

Witnesses Dobbs and Bock, when asked their occupation, answered they were organizers, but when asked who they were employed by, claimed the privilege against self-incrimination.

It is common knowledge that all labor unions have organizers and we have no knowledge of how many of these

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[3]Transcript marked "Witnesses Statement to Court in Chambers." The secrecy of said statements was removed by the Court upon the request of appellant witnesses. See Appendix 2.

organizations there are in Los Angeles. Of course, we cannot guess which of these groups, if any, employ these organizers. That would not indicate to the Court in the least that the answers to these questions would tend to incriminate the witnesses for the violation of a Federal offense. It is difficult to understand how an organizer or a musician could have a legitimate claim to the privilege against self-incrimination on these questions.

II.

The Constitutional Privilege Against Self-Incrimination May Be Invoked by a Witness Only Where the Answers Directly Tend to Incriminate Him.

There can be no difference of opinion that the provision of the Fifth Amendment to the Constitution, no person "shall be compelled in any Criminal Case to be a witness against himself," gives a witness before a Grand Jury a privilege to refuse to answer any question where the answer may tend to incriminate him. *Counselman v. Hitchcock,* 142 U. S. 547. There is a difference of opinion, however, in interpreting this basic principle, and determining what answers may tend to incriminate a witness in any given case. There is also a difference of opinion as to just how far the Supreme Court intended to go in the *Counselman v. Hitchcock* case.

The opinion of the Supreme Court in *Counselman v. Hitchcock* quotes from many Federal and State Court decisions. Some of the State Court opinions expressed a rule much broader than the actual holding of the Supreme Court. Counselman had been asked questions directly involving him in the crime under investigation. There was no doubt but that the answers would tend to incriminate him. The real question was whether the immunity

statute was broad enough to protect the witness from a prosecution based upon his own testimony. The Court held only that the immunity statute was not broad enough to afford the witness the protection guaranteed by the Fifth Amendment, and, therefore, he could not be compelled to answer admittedly incriminating questions.

Leaving the actual holding of *Counselman v. Hitchcock* and considering the language of the opinion, no definite guide for lower Courts can be found. On the one hand the Supreme Court said (p. 584):

> "It is a reasonable construction, we think, of the constitutional provision, that the witness is protected 'from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him.' Emery's Case, 107 Mass. 172, 182."

On the other hand, the Supreme Court in said *Counselman* case, *supra,* page 565, quoted the following from *U. S. v. Burr, in re Willie,* 25 Fed. Cas. No. 14, 692e:

> "It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a *necessary* and *essential* part of a crime which is punishable by the laws." (Italics supplied.)

The first quotation seems to afford witnesses a privilege against answering *any* question which may be a *source* from which evidence *may* be obtained, while the second quotation affords the privilege only where the answer would disclose a fact that would form a *necessary part* of the crime, and not merely give the Government a clue.

The *fact* which a witness may be privileged to withhold is one which may complete the chain of evidence necessary to convict him or which is a necessary part of a crime.

The failure of the Supreme Court to limit the language of its opinion to matter necessary to its decision gave rise immediately to specious claims of privilege where the real object of the claim was to secure immunity for others. This caused the Supreme Court to say in *Brown v. Walker,* 161 U. S. 591, 600:

> The danger of extending the principle announced in *Counselman v. Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege.

One of the leading cases interpreting the principle of *Counselman v. Hitchcock, supra,* is *ex parte Irvine,* 74 Fed. 954, 960 (C. C. S. D. Ohio), where Taft, J., (later Chief Justice) said:

> "It is impossible to conceive of question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon, but it is not enough that the answer to the question *may* furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in

the chain of proof against him of a crime. It must appear to the court, from the character of the question, and the other facts adduced in the case, that there is some *tangible* and *substantial probability* that the answer of the witness *may help to convict him* of a crime. Mr. Wharton, in his work on Criminal Evidence (section 466), says:

" 'We have several rulings to the effect that a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offense can be furthered. This proposition, however, cannot be maintained to its full extent, since there is no answer which a witness could give which might not become part of a supposable concatenation of incidents from which criminality of some kind might be inferred. To protect the witness from answering, it must appear, from the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend that, should he answer, *he would be exposed* to a criminal prosecution. The witness, as will presently be seen, is not exclusive judge as to whether he is entitled on this ground to refuse to answer. *The question is for the discretion of the judge,* and, in exercising this discretion, he must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. But, in any view, the danger to be apprehended *must be real,* with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlikely contingency.' " (Italics supplied.)

would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party called upon to give evidence in a proceeding *inter alios,* protection against being brought by means of his own evidence within the penalties of the law. *But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.* (Italics supplied.)

The facts of the *Mason* case (244 U. S. 362), indicate that the Supreme Court has adopted Wigmore's analysis of Chief Justice Marshall's opinion *in re Willie.* Dean Wigmore stated:

"It is obvious, from the illustrations given in the orthodox definitions of the foregoing principle, that the notion of a fact 'tending to criminate' is that of a fact forming, in the phrase of Chief Justice Marshall, 'a necessary and essential part of a crime.' The assumption is that the means of establishing the other parts are already available for the prosecution and that the claimant's disclosure of the missing link will complete the chain, and thus in effect criminate him. This doctrine about 'tending to criminate' is thus merely a logical deduction from the fundamental principle.

But the phrase has also been wrenched and extended, in a certain class of rulings, to mean much more, namely, to cover facts which, though colorless in themselves, *by possibility may furnish a clue* in searching for other and criminal facts. The privilege thus protects facts which may by disclosure lead ultimately to the extrajudicial detection of the criminal fact and its subsequent infrajudicial proof by other testimony.

How widely this differs from Chief Justice Marshall's notion may be seen in two marked features: (1) By this interpretation a fact ceases to be a 'necessary and essential part of a crime' and becomes merely a colorless fact having no criminal flavor under any circumstances,—as if the witness be asked to disclose his residence, and then in his residence be found a man who discloses the whereabouts of stolen goods. (2) By this interpretation the relation between the main crime and the fact 'tending to criminate' is not a logical and inherent one, *i. e.,* that of a legal whole to its parts, but a casual and external one, *i. e.,* a relation consisting in the probability that the one fact will so stimulate the ingenuity and fit the resources of certain prosecuting officials that they will be enabled thereby to discover the other fact, which else, with the same ingenuity and resources, would have remained undiscovered by them." (Wigmore: *Evidence,* 2nd Ed., Vol. 4, Sec. 2261.)

In *United States v. Zwillman,* 108 F. 2d 802, the Circuit Court of Appeals for the Second Circuit states that *Mason*

v. United States, shows a tendency to limit the constitutional privilege to testimony *directly* incriminating.

An examination of the questions which all the appellants were directed to answer discloses that none is as close to the crime to which the witnesses allegedly feared incrimination as the questions in the *Mason* case were to the charge of gambling. In *Abrams v. United States,* 64 F. 2d 22 (C. C. A. 2d), the Court rejected the claim of privilege where the witness relied on *Counselman v. Hitchcock,* and based its decision on the later case of *Mason v. United States.* The Court said (pp. 24, 25):

> Moreover, without subscribing to the theory that there is any constitutional right to refuse to answer simply because by some possibility a witness would provide a clue to aid a search for evidence of his own commission of a crime, it may be noticed that no answers to these questions could reasonably be thought to have furnished leads to evidence which would tend to prove him guilty of a crime unless we are prepared to go to the length of saying that in *every* criminal investigation the Constitution permits *every* person to remain silent, if *he* chooses, merely on the *off chance* that if he opens his mouth he will say something to indicate that he has committed some crime. The statement of such a proposition is enough to show its absurdity. There must be some *direct* tendency to incriminate. *O'Connell v. United States* (C. C. A.), 40 F. (2d) 201; *Mason v. United States, supra; United States v. Sullivan,* 274 U. S. 259, 47 S. Ct. 607, 71 L. Ed. 1037, 51 A. L. R. 1020.

In *United States v. Burr in re Willie, supra,* the witness a clerk of Burr, refused to answer a question as to whether he understood the cypher on a certain paper because it would tend to incriminate him in a matter under investigation by the Grand Jury. On that question, Chief Justice Marshall held that the witness could answer the question without being implicated.

In *Camorata v. United States,* 111 F. 2d 243, most of the questions which appellant refused to answer (as in the case at bar), could have been answered simply by "Yes" or "No," without any possibility of incriminating himself.

Whether the witness knew; the officials of the Los Angeles County Communist Party; the table of organization of the Los Angeles County Communist Party; or whether they knew Ned Sparks; could not possibly link them in any way with the violation of the Smith Act, any more than asking a witness what his name is and where he lives would incriminate him, or be a link in a chain, see *Ex Parte Irvine, supra.* On the same basis it could be said that a person engaged in an illegal business was privileged not to file an income tax return, because his income was derived from an illegal business. In *United States v. Sullivan,* 274 U. S. 259, 263, 71 L. Ed. 1037, 1039, the Supreme Court held in such a situation that the protection of the Fifth Amendment was pressed too far saying:

> It would be an extreme if not an extravagant application of the fifth amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. * * *

Many crimes are committed by use of the United States mails, and every person in the United States uses the mail at some time or other. Could it be said that every person has a privilege against answering any questions because it might show that he used the mail to commit a crime? It should depend somewhat on the nature of the inquiry before the grand jury and must depend a good deal on the type of question asked. Where the questions asked are preliminary, the witness should not be permitted to refuse to answer because he anticipates that the next question may be one the answer to which may tend to incriminate him.

In *O'Connell v. United States, supra,* the Court said (p. 204):

> The grand jury was investigating a lottery, a subject within its jurisdiction as lotteries almost always involve some use of the mails. 18 U. S. C. A., §336. The questions asked were apparently relevant, or at least were a proper introduction to further inquiries, which might elicit information that would lead to prosecution of crime. The appellant was not privileged to refuse to answer unless his answer would have a *direct* tendency to incriminate him; a remote or speculative possibility of danger is not enough. *Mason v. United States,* 244 U. S. 362, 37 S. Ct. 621, 61 L. Ed. 1198; *United States v. Sullivan,* 274 U. S. 259, 264, 47 S. Ct. 607, 71 L. Ed. 1037, 51 A. L. R. 1020. Many of the questions were merely whether he was acquainted with certain persons, who presum-

ably were thought by the grand jury to have some connection with the pool. An answer of "Yes" or "No" to such questions could have no *direct* tendency to incriminate him. The danger was much more remote than in *Mason v. United States, supra.* * * * (Italics supplied.)

In *United States v. Flegenheimer,* 82 F. 2d 751 (C. C. A. 2), the indictment charged that Flegenheimer used an an alias, Joseph Harmon and that part of his income was banked in account with the names of J. Harmon & Rocco Di Larmi. (No questions were asked about the bank account.) The witness, Rocco Di Larmi, was asked if he knew Joseph Harmon and he refused to answer, claiming privilege against self-incrimination. As to this the Court said (p. 751):

> It is established law that, to justify silence under claim of the constitutional privilege, it must appear that the answer which might be given would have a *direct* tendency to incriminate. *Mason v. United States,* 244 U. S. 362, 37 S. Ct. 621, 61 L. Ed. 1198; *United States v. Weinberg,* 65 F. (2d) 394 (C. C. A. 2); *Abrams v. United States,* 64 F. (2d) 22 (C. C. A. 2). In the case at bar, whether the witness answered "Yes" or "No" to the question could not possibly incriminate him. If Joseph Harmon was, as alleged in the indictment, an alias of Flegenheimer, *an affirmative answer would have been no more than an admission that the witness knew the defendant.* The next question might well have been whether he knew the defendant by the name of Harmon. As

preliminary to proof of the alias, it was a material and proper question. Whether Di Larmi could have been questioned about the bank account, we need not say, for he never was. * * * (Italics supplied.)

In *United States v. Weinberg,* 65 F. 2d 394 (C. C. A. 2), the grand jury was investigating violations of the National Prohibition Act. A section of this act gave immunity to anyone who testified before the Grand Jury. Weinberg refused to answer questions on the ground that his answers might disclose a violation of the income tax law, which was not covered by the immunity clause of the National Prohibition Act. The Court said (p. 395):

To justify silence under the constitutional privilege (Const. Amend. 5), it must appear that an answer to the question will *directly* tend to incriminate; a remote possibility of danger will not suffice. *Mason v. United States,* 244 U. S. 362, 37 S. Ct. 621, 61 L. Ed. 1198; *Heike v. United States,* 227 U. S. 131, 144, 33 S. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914 C, 128; *O'Connell v. United States,* 40 F. (2d) 201, 204 (C. C. A. 2); *Wigmore, Evidence* (2d Ed.) §§2260, 2261, 2282. It may well be doubted whether a statement of *what business the witness was engaged in,* or whether a signature on a bank card was his, is not too remotely connected with a possible future investigation of his accounts and a prosecution for income tax evasion to justify his standing mute. Many additional facts have to be assumed before his answer, whatever it may be, can tend to implicate him in violation of the tax laws. * * * (Italics supplied.)

III.

Participation or Membership in the Communist Party Does Not Constitute Self-Incrimination.

Can a witness refuse to answer a *question: "that would tend to show his knowledge of, or association with, members of the Communist Party?"* on the ground that it would tend to incriminate him for the violation of a Federal offense?

The question is not entirely new. In the case of *Barsky v. United States,* 167 F. 2d 241, a case decided March 18, 1948, by the U. S. Court of Appeals for the District of Columbia, the question appears to have been passed on. Barsky and others were indicted, tried, convicted and sentenced for wilful failure to produce records before a committee of Congress pursuant to subpoenas. The appellants objected on the ground that answers to the inquiry might reveal that the appellants were believers in Communism or members of the Communist Party. The language of the Court as found on page 244, in passing on the question, is as follows:

> The problem thus presented is difficult and delicate. In it we have not only the frequent *"real problem of balancing the public interest against private security,"* but in this instance we must do so in the midst of swirling currents of public emotion in both directions. We are presented with extreme declarations in respect to Communists and equally extreme declarations in respect to the Congressional Committee. The duty of the courts is no less than to render judgment with utter detachment. * * *
>
> (2) *We think that even if the inquiry here had been such as to elicit the answer that the witness was*

a believer in Communism or a member of the Communist Party, Congress had power to make the inquiry. (Italics supplied.)

The Court on page 246 said further, in passing on the questions asked the witness with reference to his connection with the Communist Party said:

> If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject. Moreover, the accuracy of the information obtained depends in large part upon the knowledge and the attitude of the witness, whether present before the Committee or represented by the testimony of another. We note at this point that the arguments directed to the invalidity of this inquiry under the First Amendment would apply to an inquiry directed to another person as well as to one directed to the individual himself. *The right to refuse self-incrimination is not involved. The problem relates to the power of inquiry into a matter which is not a violation of law.* (Italics supplied.)

Witness who refused to answer questions put to him by House Committee on Un-American Activities was in contempt of Congress even if answers to Congressional inquiry might reveal that witness was or had been member of Communist Party, since such inquiry is within Congress' investigatory powers; statute creating House Committee on Un-American Activities is not unconstitutional (DC Dist. Col., May 21, 1948; certiorari denied). (No 334, *Lawson v. U. S.*, 17 LW 3101.)

In the case of *Schneiderman v. United States,* 320 U. S. 118, the Government sought in 1939 to cancel a Certificate of Citizenship which had been granted in 1927, charging that it had been illegally procured in that the defendant at the time of naturalization and for five years preceding was not attached to the principles of the Constitution, but was in fact a member of, and affiliated with, and believed in and supported the principles of, certain communistic organizations in the United States, which were opposed to the principles of the Constitution, and advocated the overthrow of the Government of the United States by force and violence. At page 146 the Court said:

* * * * * * * *

> Apart from the question of whether the alleged principles of the Party which petitioner assertedly believed were so fundamentally opposed to the Constitution that he was not attached to its principles in 1927, the Government contends that petitioner was not attached because he believed in the use of force and violence instead of peaceful democratic methods to achieve his desires. In support of this phase of its argument the Government asserts that the organizations with which petitioner was actively affiliated advised, advocated and taught the overthrow of the Government, Constitution and laws of the United States by force and violence, and that petitioner therefore believed in that method of governmental change.
>
> Apart from his membership in the League and the Party, *the record is barren of any conduct or statement on petitioner's part which indicates in the slightest that he believed in and advacated the employment of force and violence, instead of peaceful persuasion, as a means of attaining political ends. To find that he so believed and advocated, it is necessary, there-*

> *fore, to find that such was a principle of the organizations to which he belonged and then impute that principle to him* on the basis of his activity in those organizations and his statement that he subscribed to their principles. *The Government frankly concedes that "it is normally true . . . that it is unsound to impute to an organization the views expressed in the writings of all its members, or to impute such writings to each member . . ." * * *

In *Dunne v. United States,* 138 F. 2d 137, 143, the Court said:

> One argument is that this "seeks to impose guilt by association." The language is incapable of that construction. The guilt is entirely individual and personal.

This is based, of course, as said by the Court on page 142 of that case that:

> "Intent is the cardinal characteristic and vehicle which is necessary to carry any and all interdicted expressions across the boundary line into crime. *This is merely an instance of usual criminal law which protects society from evildoers when they do acts—otherwise innocent—with intent to harm.* Thus a man may even kill another and he may be entirely unblamed or he may be executed, dependent solely upon the intent motivating the act."

It, therefore, appears to be well settled law that the policy and principle of any particular group, or party, irrespective of whether such group or party advocates the overthrow of the United States by force cannot be imputed to its members and certainly not to one who may have an association with such member; so that an affirmative answer to the questions propounded to the witnesses in this cause is too remote to imply even mere association.

IV.

The Court Below Properly Held That Appellant's Answers Would Not Reasonably Tend to Incriminate Him.

The witness should not anticipate questions which may have a tendency to harm him, but should wait until such questions are asked. Abrams v. United States, supra; United States v. Flegenheimer, supra.

In *United States v. McGovern,* 60 F. 2d 880, the witness was required to answer questions and state to whom he had paid moneys. The Court properly ruled that the question should be answered and, if that led to another question which might incriminate him, he could then come back to the Court and the Court could pass on the question when raised.

Witnesses Alexander Kasinowitz and Forest were asked two questions requiring a "Yes" or "No" answer. Neither answer could possibly incriminate them, nor could it constitute any link in a chain of evidence which could be followed up to show the violation of any law.

Mrs. Sherman, a musician by occupation, refuses to tell where she is employed because it may tend to incriminate [R. 220, 221].

Appellants Dobbs and Bock also refuse to tell where they are employed.

The next question was not before the Court and the Court properly refused to consider some imaginary questions and dealt with the record as it was.

None of the answers to the above questions could have given leads to other witnesses or other evidence which could be directly attributable to such answers, and which would serve as the necessary links in the chain of evidence which would cause his conviction. *Counselman v. Hitchcock, supra,* page 564, refers to a privilege against giving evidence or leads from which evidence can be obtained without which the witness could not possibly be convicted.

Additional authority for affirming the judgment in this case is found in *Miller v. United States,* 95 F. 2d 492 (C. C. A. 9), where the Grand Jury was considering a charge against Daniel Jackson for transporting Miller (a woman) in interstate commerce for immoral purposes. The questions asked were whether she had lived with him in San Francisco and had gone with him to Oregon. She was also asked whether she lived with Jackson as man and wife or worked in Oregon as a prostitute. It was stated that the only Federal offense which her answers might have tended to prove her guilty was conspiring to violate the White Slave Traffic Act. The Court said:

> It cannot, however, be said that appellant's answers, if she had answered, must *necessarily* have tended to show her participancy in such a conspiracy.

V.

Witness Was Protected Against Self Incrimination.

A.

The witnesses in the instant case, after being questioned before the Grand Jury and claiming their privilege, were brought before the Judge and in open Court, their privilege against self-incrimination challenged.[5] After hearing the evidence of each witness, in separate proceedings and the argument of counsel, upon the request of each of the witnesses that they be heard privately, in the absence of all counsel, the Court heard them in chambers. This was the first departure from the established practice, whereby it was incumbent upon the witnesses *to show in open Court* such facts and circumstances, from which the Court could determine that the answers to the questions would tend to incriminate the witnesses for a violation of a Federal *offense.*

United States v. Weisman, 111 F. 2d 260 (C. C. A. 2), cert den. 311 U. S. 651;

Zwillman v. United States, supra;

Carmorata v. United States, supra.

In *United States v. Weisman, supra,* Judge Learned Hand said:

> * * * obviously, a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else, *he will be forced to disclose those very facts which the privilege protects.* Logic-

---

[5]Margaret Iris Noble [R. 61]; Wesley Bissey [R. 121]; Ben Dobbs [R. 148]; Delphine Murphy Smith [R. 157]; Miriam Brooks Sherman [R. 163]; Philip Bock [R. 170]; Dorothy Baskin Forest [R. 175]; Samuel Harry Kasinowitz [R. 181]; Frank Edward Alexander [R. 185]; Henry Steinberg [R. 192].

> ally, indeed, he is boxed in a paradox, for he must prove the criminatory character of what it is his privilege to suppress, just because it is criminatory. the only practicable solution is to be content with the doors being set a little ajar, and while at times this no doubt *partially destroys the privilege, and at times it permits the suppression of competent evidence, nothing better is available.* (Italics supplied.)

In *United States v. Weisman, supra,* and *Zwillman v. United States, supra,* the witnesses were able to introduce sufficient evidence from which the Court could conclude that there was a present danger to the witness should they answer the questions in controversy. With this new procedure of hearing witness in chambers, a witness could, if he does not have sufficient evidence to establish his claim of privilege in open Court, without taking the witness stand, show the Court privately by his own testimony, in chambers, without any danger of exposing himself, the nature and circumstances of how the answer will tend to incriminate him for the violation of Federal offense.

B.

If the Court requires a Grand Jury witness to answer over his claim of privilege, and the direct answer given tends to criminate him, the testimony of the witness is not admissible against him on a prosecution for the offense about which he testified.

If the Court requires the witness to answer questions which naturally call for incriminating testimony and the answers given do incriminate the witness, the safeguards of the Constitution will prohibit the use of such testimony against the witness in a prosecution for the offense about which he testified and will likewise exclude all incriminat-

ing evidence obtained as a result of leads from such testimony.

While no Federal authority in point on this question has been found, the uniform holdings of the State and English Courts no doubt express the position which would be taken by the national judiciary.

The following rule is stated in *American Law Institute, Model Code of Evidence,* Rule 232, page 171:

> Evidence of a statement or other disclosure made by a person is inadmissible against him if the judge finds that he had and claimed a privilege to refuse to make the disclosure, but was nevertheless required to make it.

The text makes the following comment on this rule:

> This rule states the existing law. It safeguards the privilege against destruction by its very violation. It is not in conflict with the settled common law doctrine which refuses to exclude evidence merely because it has been procured by illegal means. A violation of a rule which has for its sole purpose the prevention of compulsory disclosure may well be given a different effect from that given to the violation of a rule which has a different primary objective.

In *9 Halsbury's Laws of England,* 2nd Ed., Criminal Law and Procedure, p. 209, Sec. 297, the following rule is stated:

> Any evidence which a defendant has given on a former occasion as a witness is evidence against him, if properly proved, unless the defendant was wrongfully compelled to answer questions tending to criminate him which he objected to answer, or unless there is some statutory provision making such evidence inadmissible in other proceedings.

In *Regina v. Edmund Garbett,* Den. C. C. 236 (1847), the defendant was convicted of a crime of forging the name of William Booth to an acceptance on a bill of exchange. During the trial the prosecution introduced in evidence a transcription of the testimony of the defendant in a civil case involving the same issue, in which, pursuant to the direction of the Court and over the witness' objection that the information asked for tended to criminate him, the witness gave testimony which directly involved himself in the crime. The Court not only failed to protect the witness from incriminating himself, but joined with the examining attorney in insisting that answers to the questions be given.

In reversing the conviction on the ground that the prior testimony was improperly received against defendant on his trial, the Court said:

> "* * * if a witness claims the protection of the court, on the ground that the answers would tend to criminate himself, and there appears to be reasonable ground to believe that it would do so, he is not compellable to answer; and if obliged to answer, notwithstanding, what he says must be considered to have been obtained by compulsion and can not be given in evidence against him."

This is a leading English case and is said to state the present law of that country. It has been cited with approval frequently by our Federal Courts.

See:

Arndstein v. McCarthy, 254 U. S. 71, 72;

McCarthy v. Arndstein, 262 U. S. 355, 358, 359;

United States v. St. Pierre, 132 F. 2d 837, 845 (dissenting opinion).

In *Regina v. Coote* (1873), 9 Moore PCCNS 463, 17 Eng. Reprint 587, a fire commission, in the investigation of the burning of a building, called several witnesses before it to give information, including the witness Coote. Coote's testimony was reduced to a written deposition form and based upon admissions made by him he was indicted and convicted of arson. He appealed on the ground that the deposition was improperly used in evidence against him, in that he was forced to give incriminating information in his deposition. The Court observed that during the hearing Coote had the privilege, which he frequently exercised, of declining to answer self-incriminating questions. In affirming the conviction, the Court recited several cases involving the admissibility of self-criminating statements, and remarked:

> From these cases, to which others might be added, it results, in their lord's opinion, that the depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consist of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends under the principle *"nemo tenetur seipsum accusare,"* but does not apply to answers given without objection, which are termed to be voluntary.

In *State v. Lloyd,* 139 N. W. 514, 517, 518 (Supreme Court of Wisconsin, 1913), the state fire marshal made an investigation of a charge of the cheating and swindling of a fire insurance company. Pursuant to subpoena *duces tecum,* one Lloyd produced certain of his records and testified at an examination held by the fire marshal. It appears that the statute authorizing the fire marshal to

issue subpoenas *duces tecum* and punish for contempt was unconstitutional and that in issuing the subpoena to Lloyd in the instant case he exceeded his authority. However, the witness did not claim his constitutional privilege against self-crimination at the hearing, although he refused to answer some of the questions on other grounds. A criminal complaint was thereafter filed against Lloyd, admittedly based upon the evidence given by him to the fire marshal and upon other evidence. The trial court quashed the information filed against Lloyd, and appeal was taken by the State.

In holding that the indictment should not be quashed the State Supreme Court said:

> It may be that a few answers of the witness will be held inadmissible upon the trial because not a voluntary confession, but this is another and a different question. "The constitutional rights of the citizen against being compelled to incriminate himself are amply protected by upholding him in his refusal to give such evidence, and by rejecting the incriminating evidence which he is ordered or compelled to give notwithstanding his refusal, when this evidence is offered against him.

State v. Faulkner, 75 S. W. 116, (Supreme Court of Missouri, 1903). Here the Court reviewed a conviction for perjury based upon the testimony of the defendant before a Grand Jury. In considering whether a person not under arrest for a crime, and summoned before a Grand Jury in the investigation of the guilt of others, can fail to claim his privilege or waive it, and testify falsely, and

be absolutely exempt from a prosecution for false swearing, the Court said:

> Two answers readily suggest themselves to this proposition that the witness in such circumstances is justified in committing perjury, and they are these: First, he may refuse to answer, and, if the court shall deny his privilege, and commit him, he can be released on habeas corpus; or, second, if he yield to the order of the court, and testify truthfully, and his truthful evidence leads to his indictment, it can not be used against him on the trial, and, if it is improperly admitted, the appellate court will reverse the trial court.

(To the same effect see *State v. Faulkner,* 84 S. W. 967; and *State v. Thornton,* 150 S. W. 1048.)

In *State v. Lehman,* 75 S. W. 139, 142 (Supreme Court of Missouri, 1903), on facts similar to those in the *Faulkner* case, the Court said:

> If, as his counsel insists, he was aware the grand jury suspected him of being implicated in the bribery with Murrell, then he knew enough to decline to criminate himself, and he could have declined to answer; and if the grand jury had persisted and the circuit court had committed him, he could have been released on habeas corpus; or, on the other hand, if he had, under those circumstances, testified to anything incriminating, it is clear that under our ruling in *State v. Young,* 24 SW 1038, such incriminating evidence could not have been admitted against him on an indictment for bribery based on his evidence, and, if he had, the judgment would have been reversed.

In *Scribner v. State,* 132 P. 933, 945 (Criminal Court of Appeals of Oklahoma, 1913), defendant appealed from a conviction of murder on the ground that he was compelled to give incriminating testimony against himself before the Grand Jury. The constitution of the State of Oklahoma provided that "no person shall be compelled to give evidence which will tend to incriminate him, except * * *." One of the exceptions is that any person may be compelled to give evidence against another person charged with any crime, but that he shall not be prosecuted for any matter concerning which he testifies. The witness appeared before the Grand Jury and, without objection, answered questions about the offense.

The Court held that the witness received no immunity because he had not first claimed his privilege. The Court also said:

> But it may be said that, if a justice of the peace has the right to hold an examining court, he also has the right to enforce the attendance of witnesses, and compel answers to questions. Within reasonable bounds this is true. But if a justice of the peace permits illegal questions to be asked a witness, and attempts to force answers to them, and commits the witness for contempt for refusing to answer such questions, the remedy of the witness is by habeas corpus. * * * But if a witness answers illegal questions, and such answers are not voluntary, this would not grant the witness immunity, and such evidence could not be used against him in any other proceeding, because it would not be a voluntary statement freely made.

Although the foregoing citations involve the inadmissibility of incriminating statements made under orders of a Court where its discretion was obviously abused, it does not appear that the admissibility is affected by the abuse or propriety of the exercise of the Court's discretion.

This problem was discussed in 1942-3 in *41 Mich. Law Review,* p. 1161 (1942-43), at p. 1169; wherein it was stated:

* * * * * * * *

> "'Adding the authority gained from a study of these grand jury cases to that gained from a study of the immunity statute cases, it becomes rather clear that the answer to the problem that we have been discussing is that when the judge wrongfully orders the witness to answer the question and the witness in so doing gives testimony that is self-incriminating, either directly or furnishing a clue or clues leading to incrimination, he thereafter is immune from prosecution for the crime so revealed.'"

Not only are the incriminatory statements, made under orders of the Court inadmissible, but also any leads obtained therefrom.

C.

Further, any statements that appellants would make to the Court under these circumstances, could not be introduced in evidence against them in any criminal case for it would be necessary to first prove that the statements were made by said appellant witnesses freely and voluntarily without any duress or coercion.

In *McNabb v. United States,* 318 U. S. 332, the Court on pages 338-9 said:

> "* * * Relying upon the guarantees of the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law,' the petitioners contend that the Constitution itself forbade the use of this evidence against them. The Government counters by urging that the Constitution prescribes only 'involuntary' confessions, and that judged by appropriate criteria of 'voluntariness' the petitioners' admissions were voluntary and hence admissible.
>
> It is true, as the petitioners assert, that a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. Boyd v. United States, 116 U. S. 616; Weeks v. United States, 232 U. S. 383; Gouled v. United States, 255 U. S. 298; Amos v. United States, 255 U. S. 313; Agnello v. United States, 269 U. S. 20; Byars v. United States, 273 U. S. 28; Grau v. United States, 287 U. S. 124. And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified,' Lisenba v. California, 314 U. S. 219, 239-40, * * *."

In *Boyd v. United States,* 116 U. S., page 616, an Information was filed by the District Attorney against thirty-five cases of plate glass seized by the Collector as forfeited. The plaintiffs in error filed a claim for the goods alleging that "they did not become forfeited in man-

ner and form as alleged." The District Attorney obtained from the Court an order upon the claimants "requiring them to produce the invoices of the twenty-nine cases." The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice; * * *" They also objected when it was introduced in evidence against them at the trial. The Supreme Court in reversing the judgment rendered in behalf of the United States, in connection with the compulsory production of the invoices, said on page 631:

> "* * * And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. * * *
>
> * * * * * * * *
>
> "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. * * *"

See also:

Anderson v. United States, 318 U. S. 350;

Gross v. United States (9th Cir.) 136 F. 2d 387.

D.

Evidence obtained by leads from a Grand Jury witness judicially compelled to testify is, like the incriminating testimony itself, inadmissible in a prosecution of the witness. In *Nardone v. United States,* 308 U. S. 338, 41 (1939), the Court held that evidence obtained by leads from an unlawful search and seizure (wire tapping) was inadmissible. The following cases also hold that evidence obtained by leads from unlawful searches and seizures is not admissible:

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392; and

Gouled v. United States, 255 U. S. 298, 307.

Also see:

Internal Revenue Agent v. Sullivan, 287 Fed. 138, 140 (D. C., W. D., N. Y., 1923);

United States v. National Lead Co., 75 Fed. 94, 97 (C. C., D., N. J., 1896);

United States v. James, 60 Fed. 257 (D. C., N. D., Ill., 1894).

E.

Quite obviously, the answers to the questions here in issue would not tend to incriminate the witnesses for a violation of a Federal offense, and it is very probable, that the purpose of the witnesses is to protect others.

The privilege against self-incrimination cannot be extended to protect persons other than the witnesses. In *Genecov v. Federal Petroleum Board,* 146 F. 2d 596, 597 (C. C. A. 5, 1944), Cert. Den. 324 U. S. 865, the Court said:

> "[6] The benefits of the Fifth Amendment are exclusively for a witness compelled to testify against himself. He cannot set them up on behalf of any other person or individual, or of a corporation of which he is an officer or an employee. *Hale v. Henkel,* 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652; *Consolidated Rendering Co. v. Vermont,* 207 U. S. 541, 28 S. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658; *Hammond Packing Co. v. Arkansas,* 212 U. S. 322, 29 S. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645; *Wilson v. United States,* 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912 D, 558; *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission,* 221 U. S. 612, 31 S. Ct. 621, 55 L. Ed. 878; *Essgee Co. of China v. United States,* 262 U. S. 151, 43 S. Ct. 514, 67 L. Ed. 917; *United States v. Jasper White,* 322 U. S. 694, 64 S. Ct. 1248."

See also:

> *Goldstein v. United States,* 316 U. S. 114 (1914);
> *Grant & Burlingame v. United States,* 227 U. S. 74;
> *Hale v. Henkel, supra.*

It cannot be claimed by the witness because it might incriminate a third party. *Hale v. Henkel, supra; Brown v. Walker,* 161 U. S. 591, 600; nor, will the privilege against self-incrimination protect the witness against the disclosure of the violation of a state or foreign law.

> *United States v. Murdock,* 284 U. S. 141 (1931).

Conclusion.

The witnesses have been dealt with most fairly before the Grand Jury and before the Court. When the appellant witnesses appeared before the Grand Jury, they were advised that they were called before that body to give information in a matter under inquiry, which was not directed toward them. Of course, this was a protection to the witness, for no court would permit a witness to be falsely lulled into a sense of security to give evidence against himself. See:

Mulloney v. United States, 79 F. 2d 566.

When the witnesses refused to answer the questions here involved, and claimed their privilege, they were brought before the Court, who heard the questions which they refused to answer. When they did not take the stand in explanation for such refusal, it was suggested to the Court by counsel for the Government, that the witnesses be heard privately in chambers so that the Court could be informed by the witnesses of the merits of their claim of privilege without the danger of counsel for the Government overhearing their statements. Certainly, if the appellant witnesses had an honest basis for their claim of self-incrimination, that was the time to tell it. There could have been no safer way of making their "present danger" known to the Court. In none of the hundreds of reported Federal and State contempt cases has a means been afforded a witness by a Court to explain his claim of self-incrimination without any danger of a public disclosure as has been afforded the appellant witnesses by the District Court. They availed themselves of the offer, to confer with the Court in chambers, but added nothing to

what had been previously stated with reference to any one of the questions.

It matters not whether they were contumacious as to one, or all, of the questions.

Pinkerton v. United States, 328 U. S. 640.

The result of sustaining the right of privilege to refuse to answer the questions here propounded would be that no witness hereafter could be compelled to answer any question before the Grand Jury except the most formal. If, the Grand Jury is to continue to function as an inquisitorial body; to continue to have its present vigor as a vital force in suppressing crime, claims of privilege as raised here must receive the rebuke ready for all those who seek to pervert the privilege against self-incrimination into a privilege to give or suppress information at will. If a witness may refuse to answer these questions, the Grand Jury will no longer be able to compel any information, but will be reduced to the plight of requesting answers that will be given or withheld, as the witness chooses.

The Court judiciously weighed the private right of the appellant witness against the public interest of our country, and after hearing the questions asked, the manner, demeanor, and the statement of the witnesses themselves, concluded that the refusal of said witnesses to answer was not based on any fear of self-incrimination, but was in wilfull defiance of the order of the Court. The trial judge is, of course, in a position to appreciate the essential facts before him and it is, therefore, generally recognized that he must exercise his discretion, fortified by common sense when dealing with this subject.

Mason v. United States, supra, 366.

The Court ruled properly in adjudging these contumacious appellants in contempt and ordering them committed to the custody of the Marshal until they answered the questions propounded to them. (*Penfield Co. v. S. E. C.*, 330 U. S. 585.) The witnesses at bar, as stated *In re Nevitt*, 117 Fed. 448, 461: "* * * carry the keys of their prison in their own pocket," and may be released when they comply with the Order of the Court.

This spurious claim of privilege on behalf of the appellants should not be permitted to defeat a function of the Grand Jury.

The order adjudging appellants guilty of (civil) contempt of Court should be affirmed.

Respectfully submitted,

James M. Carter,
United States Attorney,
Max H. Goldschein,
Special Assistant to the Attorney General,
Frank De Nunzio,
Vincent Russo,
Special Assistants to the Attorney General,
Attorneys for The United States of America,
Appellee.

APPENDIX 1.

In the District Court of the United States, in and for the Southern District of California, Central Division.

United States of America, Plaintiff, v. Frank Edward Alexander, Defendant. No. 8786-PH.

Judgment, Order and Commitment[1] in Civil Contempt.

This matter came on to be heard in open court this 25th day of October, 1948, upon complaint of the duly impaneled and constituted grand jury, September 1948 Term, present in court, in the presence of the witness Frank Edward Alexander and his counsel, Gallagher, Margolis, McTernan & Tyre, by Ben Margolis and John T. McTernan, and present as attorneys for the Government, James M. Carter, United States Attorney, Max H. Goldschein, Special Assistant to the Attorney General, and Vincent Russo, Special Assistant to the Attorney General, that said witness who appeared before said grand jury on this date and after being duly sworn the witness was asked questions to which he gave answers, both of which are as follows viz:

1. "Q. Now, do you know the names of the County Officers of the Los Angeles County Communist Party? A. I refuse to answer that on the basis it may incriminate me.

2. "Q. Do you know the table of organization and the duties of the County officers of the Los Angeles

---

[1]Note: The commitments of the other appellants are the same as the one of Alexander, with the exception of the specific questions which each was ordered to answer.

County Communist Party? A. I refuse to answer that on the basis it might incriminate me."

The Court, after hearing evidence and argument of counsel for the witness and the Government overruled the objections to the answering of said questions by said witness and upon the suggestion of counsel for the Government and upon the request of counsel for said witness, heard said witness privately, in chambers, on the matter of how the answer to said questions would incriminate or tend to incriminate him. The transcript of said hearing in chambers is hereby ordered to be kept secret until such secrecy shall be released by the said witness.

The Court then found that—

"The witness Alexander has made a statement to the court privately and his statement has added nothing to the grounds which have heretofore been urged on his behalf by his counsel, and has indicated nothing which is in exculpation of his refusal to answer the question, and which has indicated nothing which will tend to show that the answers to them would incriminate or tend to incriminate him."

The Court thereupon ordered—

"Mr. Alexander, you are ordered and directed, immediately upon the reconvening of the grand jury, to be in attendance upon them and to answer those two questions.

Do you understand the order of the Court?

Mr. Alexander: Yes, I do.

The Court: Very well."

Thereafter, on the same day, the said grand jury reported in open court, in the presence of said witness and his counsel, that upon duly and regularly reconvening, the following occurred:

"Frank Edward Alexander

called as a witness before the grand jury, having been previously duly sworn by the Foreman, resumed the stand and testified further as follows:

Examination (Continued)

Mr. Goldschein: Will you take a chair, Mr. Alexander? Frank Edward Alexander recalled. Mr. Court Reporter, will you please read the questions that the court ordered Frank Edward Alexander to answer?

(Question read as follows:)

('Q. Do you know the names of the County officers of the Los Angeles County Communist Party?')

By Mr. Goldschein:

Q. Will you answer that question, please, sir? A. I refuse to answer on the ground that it might incriminate me.

Mr. Goldschein: Will you read the next question?

(Question read as follows:)

('Q. Do you know the table of organization and the duties of the County officers of the Los Angeles County Communist Party?')

Q. By Mr. Goldschein: Will you answer that question, please, sir? A. Likewise I refuse to answer that on the ground that it may incriminate me.

Mr. Goldschein: The next question, Mr. Reporter.

The Reporter: That is all.

Q. By Mr. Goldschein: Do you recall that the Court just a few minutes ago directed you to answer those questions? A. I do.

Q. And you persist and still persist in your refusal to answer those questions? A. On the ground that it might incriminate me."

The Court thereupon, after hearing evidence and further argument of counsel for both the witness and the Government, finds that said witness is in contempt of this Court in that said FRANK EDWARD ALEXANDER did wilfully disobey and resist a lawful order of this Court, to-wit, the order hereinabove set out to answer said questions hereinbefore numbered 1 and 2, to the grand jury.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that said witness, FRANK EDWARD ALEXANDER, be committed to the custody of the United States Marshal and by him held until said witness returns to said grand jury and answers the said questions ordered by said Court to be answered as hereinabove set forth, or until the further order of this Court.

IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal, or other qualified officer, and that the copy serve as a commitment of the defendant.

DATED this 25th day of October, 1948.

/s/ Peirson M. Hall
United States District Judge.

Judgment entered Oct. 28, 1948; docketed Oct. 28, 1948; book 53, page 524. Edmund L. Smith, Clerk; by /s/ C. A. Simmons, Deputy.

Endorsed: Filed. Edmund L. Smith, Clerk. Oct. 28, 1948.

APPENDIX 2.

GALLAGHER, MARGOLIS, MCTERNAN & TYRE
Lawyers

111 West Seventh Street
Los Angeles 14, California

VAndike 7153

NEW ADDRESS
112 West Ninth Street
Zone 15

Leo Gallagher
Ben Margolis
John T. McTernan
Milton S. Tyre
Victor E. Kaplan
Robert D. Katz
John W. Porter
A. Marburg Yerkes

November 5, 1948

Mr. Agnar Wahlberg
Official Reporter
United States District Court
Los Angeles 12, California

In re: Ben Dobbs, et al.
Nos. 8786-PH to 8795-PH.

Dear Mr. Wahlberg:

In accordance with our conversation of yesterday, I am writing to confirm my request that you prepare one original and one copy of the statements made privately to the Judge by each of the above-named parties in the above

numbered cases. Will you please get this to us as soon as possible.

Enclosed herewith is our check for $351.00 covering your bill to date in the above matter.

Very truly yours,

GALLAGHER, MARGOLIS, MCTERNAN & TYRE

By /s/ B. MARGOLIS

Ben Margolis

BM:lm
enclosure

Filed: Nov. 8, 1948. Edmund L. Smith, Clerk. By /s/ Theodore Hocke, Deputy Clerk.